Supreme Court of the United States

OCTOBER TERM, 1951

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CHARLES ELMORE

No. 381

MURIEL F. McCARTY,

Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

RAY FRANKLIN BUSHAW,

Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

MARVEL SANSBURY, by Muriel F. McCarty, Guardian ad Litem,

Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

PETITIONERS' PETITION FOR RE-HEARING OF THEIR DISMISSED PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITIONERS' PETITION FOR RE-HEARING OF THEIR DISMISSED PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Muriel F. McCarty, Ray Franklin Bushaw and Marvel Sansbury, by Muriel F. McCarty, her guardian ad litem, above named, respectfully petition this Honorable Court for a re-hearing of their petition for Writ of Certiorari dismissed November 26, 1951. Time has been extended on their petitions to February 19th, 1952, in which to file this petition for re-hearing to reconsider petitioners' case, and to vacate the dismissal made herein and grant petitioners' petition for Writ of Certiorari to review the decision and judgment of the highest Court in the State of Minnesota made final May 17, 1951, in cases lately pending in said Supreme Court of Minnesota entitled therein the same as above, except that the parties in each case respectively were designated as plaintiff-respondent instead of petitioner and defendants-appellants instead of respondents, wherein one opinion was rendered, the case number being 35287, reversing the three favorable decrees and judgments in behalf of the petitioners of the trial Court in the District Court, Hennepin County, Minnesota, which was filed in said State Court March 16, 1951. Petitioners thereafter timely filed their petition for re-argument and re-hearing, which petition raised a Federal question, namely, that said State decision violated the rights of petitioners guaranteed them under the 14th Amendment of the Federal Constitution, the first opportunity the petitioners had to claim such Federal right, and said petition was denied without opinion on May 17, 1951 (R. 272-290). The aforesaid decision is reported in 47 N. W. 2d 595, 233 Minn. 362. It is this decision that petitioners seek to have reviewed.

Decision and Judgment of the Highest Court in Minnesota

It is believed by petitioners that the Supreme Court of Minnesota, in these cases, manifestly discloses in its opinion originally filed March 16, 1951, such vacillation and incongruity on the part of that Court so as to effectively make clear and certain its error of judgment and law to an extent of being arbitrary and capricious in dealing with each of petitioner's cases, before petitioners petition for re-argument and re-hearing thereof; and that the Supreme Court of Minnesota upon petitioners' raising a Federal question and claiming a violation of their rights guaranteed them under the 14th Amendment of the Federal Constitution in their petition for re-argument, through lack of full appreciation and application of petitioners' rights claimed under said 14th Amendment, ordered a dismissal, without opinion, of petitioners' petition for re-argument, the injustices of which can now be corrected only on review by the Court to whom this petition is addressed.

Nature of Petitioner's Cases and Summary Statement of the Matter Involved.

Respondent R. R. Nelson is the acting administrator of the estate of Albie C. Sansbury, who died April 28, 1948, leaving an estate of approximately $20,000.00. He had married Alice Ames Hierlmier, a widow, August 20, 1907, and they thereafter lived a conjugal life until death parted them by the decease of Mrs. Sansbury on March 21, 1947. There were, by said marriage, no issue born unto them. Mrs. Sansbury had been twice married and twice divorced before marrying Mr. Sansbury. She had two children by her first marriage to Frank Bushaw, namely, petitioners Muriel F. McCarty and Ray Franklin Bushaw, and on December 12, 1901, when a divorce decree was rendered, it awarded Mrs. Bushaw (Mrs. Sansbury) the custody of the two children. Mrs.

Bushaw thereafter married Henry Hierlmier and there was one child of said marriage, Marvel Hierlmier, petitioner Marvel Sansbury, and they were divorced March 26, 1906; and the custody of Marvel, by the decree, was given to Mrs. Hierlmier (Mrs. Sansbury) (R. 85-86, 144-145). The pivotal question on which this litigation has revolved concerns the establishment of the status of Mrs. Sansbury's three children, petitioners herein, at the time she married decedent, Albie C. Sansbury, August 20, 1907. Petitioners allege in each of their actions that there was an oral agreement made on or about the time of the marriage of their mother to Albie C. Sansbury, namely (R. 2-3):

> "IV. That immediately after the marriage of Albie C. Sansbury to their mother on Aug. 20, 1907, the plaintiff and her aforesaid brother and her aforesaid sister and said Albie C. Sansbury and his wife, Alice Ames Sansbury, contracted orally by and between each other in fact and substance as follows:
>
> That if plaintiff and her said brother and her said sister would live in the house and home of Albie C. Sansbury and his said wife and live with them and give them their services as they should be directed until they had become of age or married, that in consideration thereof, at their death said Albie C. Sansbury and his said wife would give and leave to the plaintiff and to each of her said sister and her said brother full child's proportionate share as if they had been born unto them, of all the property, both real and personal, which they own and which they might own at the time of their death."
>
> * * * * *
>
> "VIIa. That plaintiff under and pursuant to aforesaid agreement assumed a peculiar and domestic relation to decedent, Albie C. Sansbury, as a member of his family; and conducted herself towards him as a dutiful daughter and obeyed and faithfully served decedent, Albie C. Sansbury, and there followed and persisted an intimate companionship and personal care and attention and affection that cannot be measured in money. That decedent, Albie C. Sansbury, bargained for and re-

ceived the benefit of plaintiff's companionship and affection, as well as her energies and attention of her services under and pursuant to the aforesaid agreement. That plaintiff never received any consideration or wages for services rendered, or any part thereof, in aforesaid relationship. That decedent, Albie C. Sansbury, apparently in good health, was suddenly stricken while working in his garden acres. That said decedent, Albie C. Sansbury, did not perform the aforesaid agreement on his part to be performed and failed and neglected to convey, assign and devise a child's portion of his property to the plaintiff, as he had agreed to do. That plaintiff in justice is entitled to have, receive, and to be decreed to her an undivided one-quarter of decedent Albie C. Sansbury's estate that he died possessed of."

That pursuant to said agreement and ever thereafter the relationship of parent and children existed and they lived in one household as one family addressing each other as natural children and a natural father would, giving each other service, society and affection of that of parent and children until petitioners Muriel F. McCarty and Ray Franklin Bushaw married. Petitioner Marvel Sansbury lived with the Sansburys until death broke up their home, and she was known as Marvel Sansbury. (Testimony of petitioner Muriel F. McCarty, R. 144-171, and testimony of petitioner Marvel Sansbury, R. 17, and petitioner Ray Franklin Bushaw, R. 85-110.)

The relationship of grandad and grandchildren existed between petitioner McCarty's children and Albie C. Sansbury (R. 171-179).

That respondent, Margueriette H. DeKarlo, was born out of wedlock August 28, 1916, and was adopted by Mr. and Mrs. Sansbury through court proceedings October 27, 1923 (R. 182-209, 82-85). On May 5, 1948, she petitioned the Probate Court of Hennepin County, Minnesota, to have R. R. Nelson appointed as administrator of the estate of Albie C.

Sansbury, who had died April 26, 1948, naming herself as daughter and sole heir of decedent's estate. Petitioners herein filed objections to said petition, as well as petitioned for administration therein, naming Margueriette H. DeKarlo, Muriel F. McCarty and Marvel Sansbury as adopted daughters of the decedent, and Ray Franklin Bushaw as adopted son of decedent, as heirs to decedendent's estate. Before the hearing of the petition of May 5, 1948, petitioners withdrew their objections and dismissed their petition on June 2, 1948, without prejudice, before any hearing or disposition had been had of the DeKarlo petition on May 5, 1948 (R. 67-75).

Petitioners thereafter and on July 2, 1948, instituted separate actions in equity in the District Court of Hennepin County, Minnesota, to have decreed to each of them a child's interest, conceding that Margueriette H. DeKarlo was entitled to a child's interest, and that each of the petitioners be decreed a one-fourth interest in the estate of Albie C. Sansbury (R. 1-14). These actions came to trial in October, 1949, and were tried together. It was agreed between the parties that a jury be called to determine the question of fact as to whether or not an oral agreement had been made on or about August 20, 1907, between Albie C. Sansbury on one side, and his wife, Alice Ames Sansbury, and her children, the petitioners, on the other side, that thereafter the relationship of natural father and child should exist between Albie C. Sansbury and each of the children (R. 24-26). The jury rendered a verdict in each of petitioners' cases that such an agreement had been made. The trial judge thereafter, on March 24, 1950, made separate findings and conclusions and memorandum in each case decreeing that each petitioner was entitled to a child's interest, a one-fourth interest, in the estate of Albie C. Sansbury, and judgments were docketed accordingly March 31, 1950 (R. 37-59).

There was no motion for amended findings and conclusions and no error at the trial was claimed by defendants. On April 21, 1950, defendants appealed from the aforesaid three judgments to the Supreme Court of Minnesota under one appeal (R. 271). The Supreme Court of Minnesota reversed all of said three judgments March 16, 1951 (R. 272-280). Petitioners' petition for re-argument was filed May 8, 1951 (R. 280-346). Petitioners' petition for re-argument was dismissed without opinion May 17, 1951 (R. 346). The title and date were inadvertently omitted so the order denying petition for re-argument is herewith set out in full:

(Petition Denied)

State of Minnesota
Office of Clerk of Supreme Court
St. Paul, Minn.

May 17, 1951

Muriel F. McCarty, et al,
Respondents,

vs. 35287

R. R. Nelson, Admr. of Estate of Albie C. Sansbury, et al,
Appellants.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

Grace Kaercher Davis,
Clerk Supreme Court.

Mrs. Leah Rempher, a sister of Alice, and a maternal aunt of the petitioners, was the only witness able to testify in regard to the oral agreement upon which petitioners' actions are based. She was present at the wedding and heard and participated in the conversation wherein Mr. Albie C. Sansbury stated in substance the agreement between him and

Alice Ames Hierlmier, who became his wife, to the effect that he was taking the three petitioners, children of his wife, as his own natural children and that he became a natural father to them and would treat them as a natural father would (R. 112, 113).

"Q. Did you have any conversations with Mr. Sansbury and your sister and the children at any time about these children and the marriage? * * *

A. Well, we were sitting around the dinner table, all of us, talking, and it was the night before I was to come home. No, it couldn't have been that night. Anyway, we were all there at the dinner table. They were making plans for the family, being recently married—

Mr. Abdo: Just the conversation, will you, please?

A. Well, I have to lead up to it, don't I? Anyway, they were talking about getting acreage somewhere. They wanted a farm and wanted a home away from that hotel. It wasn't the place for children. I know Charley spoke up and he said to Muriel and Ray and all of us—he said: 'If you kids do your part, why, I will do my best as a father to you children and go out on this place.' Then he also brought up the fact that the hotel wasn't a good place for Muriel and asked me if I would take Muriel to Grand Forks and put her in school up there. I think she was about twelve or thirteen years old. I'm not sure. I was reluctant to, working in an office from nine in the morning to six every night. I rather hesitated about it. Eventually I agreed to take Muriel to Grand Forks. Charley asked me if he shouldn't pay me board. I wouldn't take board. He said: 'I will furnish her bedroom,' and give me blankets. He got a pass to Grand Forks and she stayed there until the next March and went to school."

* * * * *

"Re-Direct Examination.

By Mr. Melin:

Q. Mrs. Rempher, in the conversation you had with Mr. Albie C. Sansbury and in the presence of your sister and Muriel and Ray, soon after his marriage, did Mr.

Sansbury say anything about a natural father, and if so, just relate what was said?

A. You mean when they were talking around the table.

Q. Yes.

Mr. Abdo: Answer that yes or no.

A. Yes or no? Yes, he did.

Q. (By Mr. Melin) Will you state what was said?

A. Well, he said he had agreed—they were talking about their marriage—he said he had agreed to give those children—

Mr. Abdo: Just a moment. I move that that be stricken on the ground it is not responsive.

The Court: Well, he did not use the third person when he spoke. You are asked to give the words he used.

Q. (By Mr. Melin) Well, substantially, what did Mr. Sansbury say in that regard?

A. Well, in telling me about it, to the best of my recollection, he said: 'I have agreed to take these three children as my own children and treat them as a natural parent would.' That is the substance of what he said."

Witness *Mrs. Leah Rempher* further testified in substance that her sister, Alice, would marry no man unless he would agree to take her three children as his own children and become and be a natural father to them (R. 111, 115):

"Q. Did you notice anybody else living there at the time?

A. Well, just the family was all.

Q. Did you have any meals there that you remember?

A. Yes. I stayed there a day or two. I have forgotten how long.

Q. Was anyone present at those meals that you remember?

A. Mr. Hart was there for dinner one night.

Q. Did you meet a man by the name of Albie C. Sansbury while visiting your sister at that time?

A. I did at that time, yes.

Q. Tell the Court and jury how you met Mr. Sansbury and what took place.

A. Well, before I met Mr. Sansbury my sister ex-

plained to me that Mr. Hart wanted to marry her and take the children as his own, that is, Ray, Muriel and Marvel. She wanted me to meet Mr. Sansbury because she liked him better than Mr. Hart. She wanted me to meet him. We took my baby and went out to Fort Snelling where I met him. I visited with him on that trip. That was the first time I had met Charles.

Q. The first time you met Charles Sansbury?

A. Yes."

"Q. (By Mr. Melin) State what your sister told you just prior to her marriage with Mr. Sansbury.

A. Well, she had been having a difficult time keeping the children together, and that was the time she took me out to meet Sandy or Mr. Sansbury, and she said, of course, she was concerned over these children, and she said she would not marry any man unless he would take her children as his own children. That's the statement she made then, and I know Alice well enough to know that she wouldn't have married again if she hadn't been sure he would have taken them.

Q. Your conversation at the Garfield Hotel included these facts that you just stated or the substance of them?

A. Well, it was in substance, yes. They were talking the whole thing over, their getting married, and the family."

Witness *Mrs. Leah Rempher* also testified to the fact that two years after the marriage she returned to visit the Sansbury family in Minneapolis and that from her observation of the family as well as hearing conversations between Mr. Sansbury and the children, they lived the life of a normal family of parents and children (R. 115, 116).

There were five witnesses who had lived as neighbors of the Sansbury family during 1909, 1910, 1911 and 1912 (R. 126-140). *Charles W. Derby* testified, in part, as follows (R. 127-128):

"Q. Did you visit back and forth, your family and the Sansbury family?

A. Oh, yes. We were together quite a bit.

Q. What did you observe about the Sansbury family,

if anything? About their relationship, if any, between the parents and the children?

A. Well, the first time I met the children there, he introduced them to me as his son and daughter.

Q. You heard conversation between the father, Mr. Sansbury, and these two children, did you not?

A. Oh, yes.

Q. How did he address the children?

Mr. Abdo: Just a moment. Will you please fix the time and place of the conversation?

Q. (By Mr. Melin) That is, at the last house they moved to? What is the address?

A. That was 4106 22nd Avenue."

* * * * *

"Q. (By Mr. Melin) How did they address each other?

A. Oh, the children called him father. Mrs. Sansbury, mother.

Q. How did Mr. Sansbury address the children?

A. Son and daughter.

Q. Over what period of time did this sort of conversation, addressing between the children and father, take place, especially between Mr. Sansbury and the children? How long a period of time?

A. Well, when I first met them. That was in 1908. Around there, 1908.

* * * * *

Q. What did you observe Ray do, the son, around the premises?

A. Well, he did a lot of work around there. Carrying in wood, taking care of the garden.

Q. Did they have any implements or any animals around there whereby they worked the garden?

A. I know they had a horse and buggy and a plow.

Q. Was the buggy used at any time?

A. Yes.

Q. How was the buggy used?

A. I seen Ray take his father to work.

Q. When he worked for the railroad?

A. Yes. The street car only run out to 34th and Cedar and we had to walk from 40th Street and 22nd

Avenue to 34th and Cedar to take the street car. So he would take him to work with the horse and buggy."

Witness *Mrs. Richard Wagner* testified in part as follows (R. 133, 134):

"Q. Now, did your family and the Sansbury family visit any?

A. Yes.

Q. How frequently?

A. Well, quite a bit. I think every day.

Q. Who were the members of the Sansbury family that you remember?

A. Well, Mr. and Mrs., and Marvel, the youngest, and Ray and Muriel.

Q. How did they act among themselves, if you observed?

A. Well, they always seemed to get along just fine. I never seen or heard any quarreling or any trouble among the parents or children.

Q. How did the children address the parents, both of them?

A. Well, mother and dad.

Q. How did the parents address the children?

A. By their names."

* * * * *

"Q. Did you notice any mechanism or animals around there?

A. Yes. I know they had a horse and chickens and they had a calf or a small cow.

Q. And who did you see working in the garden there?

A. Well, Ray mostly. They all helped.

Q. Who did you see driving the horse?

A. Ray, and Mrs., too.

Q. Did you see Mr. Sansbury with the horse and buggy at any time?

A. Yes."

* * * * *

"Q. What did you see Muriel do?

A. Oh, she helped around the house, washing, ironing, cooking, and everything."

Witness *Mrs. Florence Sarah Stasel* testified in part as follows (R. 140-142):

"Q. How frequently did you visit back and forth there?

A. Every chance I got. When mother couldn't find me she knew where to look for me.

Q. Then you were at the Sansbury home quite frequently?

A. Yes, sir.

Q. Will you name the members of the Sansbury family?

A. Well, Mr. and Mrs., Muriel was the oldest, and Ray, then Marvel.

Q. Then you participated in conversations with them, did you?

A. Certainly. I have had meals at their table.

Q. And you were exchanging visits?

A. Yes. Friendly. Attending Muriel's wedding there."

* * * * *

"Q. Now, Mrs. Stasel, did you hear any conversation between Ray and Mr. Sansbury about his working in the garden?

* * * * *

A. Do you want the exact date?

Mr. Abdo: Approximately.

A. Well, it would be in 1909 or 1910.

Q. (By Mr. Melin) And what was said by Mr. Sansbury?

A. Well, Ray was supposed to work in the garden.

Mr. Abdo: Just a moment. Just relate the conversation as you remember it.

A. Well, he came out and said, 'Why didn't you weed the onions as I asked you to?' 'That is part of your work around here.'"

* * * * *

"Q. Muriel sometimes?

A. Yes. What I remember distinctly about Muriel is she had a guitar that her father gave her, and she enjoyed it very, very much.

Q. Do you remember any particular happening there in the Sansbury family?

A. Muriel's wedding, for one.

Q. Was Muriel married out there?

A. She was married at 4106 22nd Avenue.

Q. Was that a family wedding?

A. A family wedding. Mr. and Mrs. Sansbury were there and all her neighbors and friends."

* * * * *

"Q. (By Mr. Melin) And after that wedding of Muriel's, what did she do?

A. After the wedding Muriel and her husband left for Medford, Wisconsin, the next day, and I haven't seen them over a period of a good many years."

Witness *Carl Otto Frenzel*, a friend of Mr. Albie C. Sansbury, testified that at one of the times when he stayed over night with Mr. Sansbury at his home in 1938, in a conversation with Mr. Sansbury about his family, he stated in part the following (R. 121-123):

"Q. How long did you know Mr. Albie C. Sansbury?

A. Well, 1933 up to date.

Q. Up to the time he died?

A. Up to the time he died, yes.

Q. Did you visit Mr. Sansbury at his home?

A. Yes, I was out on Oakland.

Q. Oakland?

A. Oakland, yes. I don't know just exactly the number.

Q. 4605—that the number, approximately?

A. It was out that way, yes.

Q. Did you visit him at any other place?

A. I used to go occasionally down to the river, down to his little home or farm down there.

Q. At 81st and Lyndale Avenue North and the river?

A. That's on the river bank, yes.

Q. How frequently did you visit him there?

A. Well, I couldn't say exactly how many times, but I was out there quite a few times. In fact, I stayed there a couple times over night. * * *

Q. Did he ever talk to you about his family?

A. Well, not very much.

Q. Well, did he ever talk to you about his marriage to Alice, his wife?

A. Well, he said something about the children. • • •

Q. What was said by Mr. Sansbury in that conversation?

Mr. Abdo: Just a moment. Will you fix time and place?

A. Well, this was out at the home on the river.

Mr. Abdo: About when was that?

A. Well, I couldn't say the exact date because I was out there quite a few times. I can't remember which date it was when we were talking about that.

Mr. Abdo: Give us an approximation of the year and the month.

A. It would be in 1938, I would judge.

Q. (By Mr. Melin) Was that when you stayed over night?

A. That time I stayed over night, yes.

Q. Just state what was said by Mr. Sansbury about his marriage to Alice, and what was said about the children that Alice had at the time of his marriage.

A. Well, he said that he would take care of the children just like his own."

• • • • •

"Q. (By Mr. Melin) Did he talk about how he was going to take care of any or all of these children?

A. Well, the way he said, he was going to take and divide it up. He said: 'I am not going to take this with me.' He wasn't going to take it with him, but was going to provide for each of them when he passed away.

Q. He said he was going to provide for each child?

A. That's right. • • •

Q. What children, if any, were mentioned?

A. He mentioned all of them."

Under the agreement involving Mr. Bushaw, the relationship between him and Mr. Sansbury as child and parent continued from 1907, when the agreement was made, until 1948, when Mr. Sansbury died.

The testimony of respondent Bushaw, by reference, is in substance and found in the record as follows:

He was a party to and heard the agreement testified to by witness Rempher between his mother and Albie C. Sansbury just after their marriage, the substance of which conversation had been stated and repeated to him at other times with reference to his status in the new family at the time of the marriage of his mother, Alice Hierlmier, to Mr. Albie C. Sansbury. He knew Albie C. Sansbury for about two years before aforesaid marriage. He also knew William Hart before his mother's marriage. He lived and served forthwith as a member of the family at the hotel where the marriage took place and became night clerk therein at the direction of Mr. Sansbury. He moved as a member of the family from the hotel in the spring of 1908. He was 15 years old at the time of aforesaid marriage. He went to school and in the summer worked in a mattress factory, bringing home his wages earned (R. 87-91). He moved and lived with and served as a member of the family, his parents, in 1909, to places having acreage. He at these places helped to cultivate a garden, raised chickens, kept a cow and horse. He drove Mr. Sansbury almost daily to and from work at the Milwaukee Railway Shops, 24th and Hiawatha, with horse and buggy. He also worked at Dan Patch Airline and at the Harwood Bag Factory while here, bringing home his wages. He in 1912 moved and lived with the family at Hutchinson, Minnesota, where Mr. Sansbury's railroad work required him to be for about a year, and here he worked learning the automobile trade. He returned with the family to Minneapolis and lived and worked as a member there at 2525 Cedar Avenue. He worked for Dan Patch Airline again and the Milwaukee Road, turning in his earnings to the family (R. 91-95). He was married in 1915 while living at 2444 Hiawatha Avenue and within a year took up his own residence in

Minneapolis, Minn., and continued to work for the Milwaukee Railroad, supporting his own family. He then moved with his own family to Margie, Minn., where he engaged in the logging and lumbering business, and remained there for a period of about ten years. Here Mr. and Mrs. Sansbury visited him (R. 95, 96). He, upon return to Minneapolis, lived at 4444 Third Ave. S. Then in 1931 he lived at 81st and Lyndale Ave. N., where he dismantled a large barn and built a cottage on the Sansbury three acres, receiving as compensation only his provisions for himself and family (R. 96-98). He lived thereafter at 1519 Fourth Ave. S. and 1805 Fifth Ave. S. for about three years with his family. Here Mr. Sansbury on wintery nights, to enable him to make his railroad runs, stayed with Bushaw on occasions over night since his home at 81st and Lyndale became impassable in bad weather. His home was broken up in 1936 since his wife became institutionalized and the furniture for his home was removed to Sansbury's home at 81st and Lyndale Ave. N., where it remained. He accompanied Mr. Sansbury when he purchased implements for his acreage at Lyndale and 81st. He helped cultivate the garden at 81st and Lyndale and during one year planted an acre of potatoes (R. 98-100). He visited Mr. Sansbury after his mother had died in March, 1947. He obtained a job as an engineer at the Francis Drake Hotel in the winter of 1947-1948 on the recommendation of Mr. Sansbury (R. 101, 102). Mr. Sansbury died April 26, 1948.

Under the agreement involving Mrs. McCarty, the relationship between her and Mr. Sansbury as child and parent continued from 1907, when the agreement was made, until 1948, when Mr. Sansbury died.

The testimony of respondent McCarty by reference in substance and found in the record is as follows:

She was a party to and heard the agreement testified to by

witness Mrs. Rempher between her mother and Albie C. Sansbury just after their marriage at the hotel, the substance of which conversation had been stated and repeated to her at other times with reference to her status in the new family at the time of the marriage of her mother, Alice Hierlmier, to Mr. Albie C. Sansbury. She had met Mr. Sansbury about two years before his marriage to her mother. She had met Mr. Hart prior to the marriage of Mr. Sansbury to her mother. She immediately upon the marriage, at the direction of Mr. Sansbury and his agreement with her aunt, Mrs. Rempher, in view of their not living in a private home but in a hotel, and until such place could be obtained, sent her with her aunt to Grand Forks, North Dakota, there to go to school, which she did, and returned in the spring of 1908 (R. 146, 147). When she returned to Minneapolis her parents were living in a private home. Here, besides doing work at home, she worked in a bakery and brought home her earnings to the family. She thereafter moved as a member of the family to places having acreage, namely, Rice Lake, and 4108 22nd Avenue South, both in Minneapolis. Here she did work about the home places, helped with the garden, and did housework. She also worked in the Harbor Bag Factory, and in an automobile shop, making parts, and brought home her earnings to the family. She, when speaking to Mr. Sansbury, called him "Dad," "Pa" and "Father" (R. 147-151). She, while living at 4108 22nd Ave. S., in the fall of 1910, married John McCarty from her home town, Medford, Wis. She was given a family wedding and thereupon moved to Wisconsin, where she lived until 1927. Here Mr. and Mrs. Sansbury visited her frequently. She visited them in Minneapolis three times. There were nine children of this marriage. She divorced her husband due to cruel and inhuman treatment and secured custody of the children. She and her family were brought to Minneapolis

by Mr. Sansbury in his automobile to his home at 4605 Oakland Avenue. Thereafter she found various places to live in Northeast Minneapolis and at the beginning of such residence, both Mr. and Mrs. Sansbury would stay with her over night to help her with her family (R. 152-155). She graduated as a beauty operator and soon made her living in that business for her family. She accommodated Mr. Sansbury during severe winter weather by allowing him to stay over night in her home on occasions. She helped Mr. and Mrs. Sansbury during the depression (R. 155-157). She went into partnership in the purchase of a home, 2507 Pierce St. N. E., Minneapolis, with her son-in-law, Norman Nelson, in 1943. Mr. Nelson was called into the Navy and upon his return therefrom his family had increased and he desired more room and a separate home for himself and bargained to have his half purchased from him by Mrs. McCarty for $1,000. The original purchase was financed by Mr. Sansbury. To secure this $1,000, application was made to FHA but due to the inadequacy of the security the loan was not made. The property was then offered for sale. Mr. Sansbury learned of the situation whereupon he made an agreement with Mrs. McCarty about it, and reference is made to Mr. Nelson's testimony in regard thereto.

Norman Nelson, son-in-law of respondent McCarty, testified that he made application to FHA for a loan on the house at 2507 Pierce St. N. E., Minneapolis, owned in common by himself and his mother-in-law, Mrs. McCarty, so as to obtain $1,000, the amount he had put into the house, but failed. Thereupon he put a sales sign upon the premises and employed a real estate agent to effect a sale. Mr. Sansbury saw the sign and made inquiry and learned that Mr. Nelson desired to secure $1,000, the amount of his investment in the place, to buy a home for his increasing family. Mr. Sansbury thereupon agreed with Mrs. McCarty that he would

furnish her with $1,000 so that she could pay Mr. Nelson the amount April 26, 1948. The agreement could not be consummated for Mr. Sansbury suddenly died during the forenoon of April 26, 1948 (R. 157-162).

Evidence Favorable to Respondents

While it is believed by petitioners that the summary of facts contains all that is essential to review the decision of the Supreme Court of Minnesota, petitioners, in fairness to this Court and also to respondents, call attention to some additional evidence which discloses that there were some conflicting issues of fact which might justify the jury and a Court, as triers of fact, with inferences favorable to respondents; also, that to draw the proper inferences the triers and not the review Court should weigh the evidence and pass upon the credibility of the witnesses. Respondents denied in their answers in the trial Court that petitioners had any claim upon the estate whatever, and offered some evidence to refute petitioners' claims of any share in the estate property.

Mrs. Rosemary L. Belk, who was a tenant of Mr. Sansbury for a short time before his demise, gave testimony in behalf of respondents, in part, as follows (R. 224-226):

"Q. While you were there did you ever see Ray Bushaw?

A. Yes. Twice.

Q. When was the first time that you saw him?

A. We had just finished eating dinner on Sunday when we noticed a black and white bike with somebody riding it come into the yard.

Q. About when was it?

A. Well, I can't say. It was in weather when you would be riding a bike, so it must have been after winter was over. It must have been the following spring after we had been there for the first winter.

Q. That is, the spring of 1948?

A. Yes.

Q. You saw him there on a bike?

A. Yes.

Q. Were you introduced to him at that time?

A. No, I wasn't. I told one of my children—

Mr. Melin: Just a minute. What you told is not responsive.

The Court: That's correct.

Q. (By Mr. Abdo) While this individual was there on the bike, did he have a conversation with Mr. Sansbury?

A. Yes.

Q. What was the conversation?

A. He said that is my wife's no-good son.

Q. Did you see Mr. Bushaw on another occasion?

A. Yes, I did.

* * * * *

Q. When was that?

A. On a Sunday morning.

Q. Can you state the approximate time?

A. We were going to 11:00 o'clock Mass, so I imagine it was about twenty minutes to. Somewhere thereabouts.

Mr. Melin: It is not specific as to time and date.

Q. (By Mr. Abdo) What month?

A. It must have been—well, it was after the first time. I couldn't remember just exactly how long afterwards.

Q. Can you give us an idea? Was it a month or two or three?

A. Oh, it must have been a couple months.

Q. A couple months after you saw him the first time?

A. Yes.

Q. Where did you see him?

A. In Mr. Sansbury's yard.

Q. Did you hear any conversation between them?

A. I did.

Q. What was the conversation?

A. I can't repeat the exact words.

Q. Give us the best of your recollection.

A. He said he didn't want him around there.

Q. Who said that?

A. Mr. Sansbury.

Q. Did he say anything else that you recall?

A. No.

Q. Did Mr. Bushaw say anything?

A. I didn't hear anything he said.

Q. Was the individual you saw at that time—is he in court here anywhere?

A. Yes, he is.

Q. Where?

A. In the second row of seats. The man with the gray hair.

Q. The man with the gray hair. Is he the man that was on the witness stand previously?

A. Yes.

Q. Is he the man they referred to in court as Mr. Bushaw?

A. He is.

Q. Did you ever have any conversation with Mr. Sansbury relating to finances or money?

A. Yes.

Q. When did you have such conversations?

A. At different times.

Q. When was the first time that you recall?

A. At lunch one day, I believe.

Q. What was said?

Mr. Melin: I move that the question be more specific as to time, day, month and year.

Q. (By Mr. Abdo) Give us the approximate time.

A. Well, I had my washing outside so I know it was summer. I had to wash that morning, and I always hung in the neighbor lady's basement in the winter. So I know it was nice weather. And he was only there one summer that he lived.

Q. That would be the summer of 1948?

A. Yes.

Q. What was the conversation?

A. We were speaking of wills. Another neighbor lady was present.

Q. Who was there?

A. Mrs. Robert Timons. She told him he should make a will. He said, oh, I am going to live to be a hundred. He didn't need a will. He said anything I have would go to my own—everything I have is Babe's. She is my only flesh and blood.

Q. When he used the word, "Babe," did you know whom he was referring to?

A. Yes, I did. He referred to her many times as "Babe."

The Court: The last part is stricken.

Q. (By Mr. Abdo) To whom was he referring?

A. Margueriette.

Q. Margueriette DeKarlo, one of the defendants here?

A. Yes."

Rebuttal testimony of Ray Franklin Bushaw denies he had ridden a bicycle in forty-five years; also denies the visits testified to by witness Belk (R. 109).

Cleon Charles Leach, who was a co-worker with Mr. Sansbury for many years, gave testimony in behalf of respondents in part as follows (R. 244, 245, 248):

"Q. Did you ever meet—prior to Mr. Sansbury's death—did you ever meet any members of his family?

A. Margueriette.

Q. One of the defendants here?

A. That's right. * * *

Q. Where did you meet her?

A. The first time I met her was when Mr. Sansbury was firing for me. She was a little girl, thirteen or fourteen years old. She was over to the house several times after.

Q. Your house?

A. Yes.

Q. Did you ever meet any of the other members of Mr. Sansbury's family?

A. No.

Q. Did you ever meet Mrs. Sansbury?

A. I never did.

Q. Did you ever see her?

A. No. * * *

Q. During the time you were with him, did he ever discuss any members of his family with you?

A. He never mentioned them.

Q. Did he ever mention any children that he had?

A. Never.

Q. At the time you met Margueriette, how was she introduced to you?

A. She came over to the house alone, see. She says: 'Mr. Sansbury is my dad. I am Margueriette,' or something like that.

Q. Mr. Sansbury had never previously mentioned her to you?

A. Oh, yes.

Q. He had mentioned Margueriette?

A. Yes. * * *

Q. What did he say about it?

A. I recall very distinctly that he said: 'She is my boy and her mother's girl.' * * *

Q. Did you ever visit the Sansbury home prior to Mr. Sansbury's death? * * *

A. I did not visit him. I visited his home. He was not at home. * * *

Q. Did you ever have a conversation with Mr. Sansbury regarding his financial status?

A. Money?

Q. Yes.

A. Yes.

Q. Do you recall when the last conversation of that sort was that you had with him?

A. Yes.

Q. About when was that?

A. Oh, possibly three or four or five years ago. * * *

Q. Do you recall the next time when you had a conversation of that sort?

A. Well, every trip, why, we would talk about something on that order. But the next time that I recall very distinctly was when he was counting his bonds and had his bank book out on the bed, see.

Q. When was this, about?

A. About a year and a half before he died.

Q. This was in Montevideo.

A. In Montevideo, yes.

Q. What was said?

A. I said—he wasn't feeling very well—I said, 'why don't you take the pension,' and he said, 'No. By working until—.' He mentioned the date. Another year. He would have acquired approximately twenty thousand

dollars, see. And that it would be pretty nice to leave the kid that much money.

Q. Did he tell you whom he meant by the kid?

A. Oh, yes. We were talking about Margueriette at the time out in Hollywood.

Q. Did you have any later conversation with him along those lines?

A. The other one I remember very distinctly was when he—I think it was after Mrs. Sansbury died, or maybe just before that, he received a letter from Hollywood in regard to some business venture that apparently his daughter was going into or something.

Q. When did this occur? You say shortly after Mrs. Sansbury died?

A. Either before or after. It was that year, see.

Q. Whereabouts was this?

A. In the box car.

Q. What was said?

A. And they wanted Albie to send some money for this business venture, and Albie asked me what I thought he should do. I told him he should get on a plane and go out and investigate and make a stay of about thirty days.

Q. From whom was the letter?

A. From Margueriette.

Q. Was anything else said at that time?

A. He said he couldn't afford that, but he guessed he would send the money because she would get it all some day. But, nevertheless, he figured on living for 25 or 30 years and it was nice to have it while he was alive."

Questions Presented

The questions herein presented by petitioners for review arose after the final decision of the Supreme Court of Minnesota, the highest Court in the State, which reversed favorable judgments for the petitioners in the trial court. Upon the rendition of such a decision, petitioners duly and timely petitioned for re-argument wherein was raised the federal question that said State Court decision abridged petitioners' rights guaranteed them under Section 1, Article 14 of the Amendment of the United States Constitution, to allow a petition for writ of certiorari:

I. Petitioners in their petition for reargument set out the following federal claim which was applicable to the whole of petitioners' petition for reargument and reversal of the decision of the highest State Court:

> "Respondents claim that the decision of this Honorable Court rendered March 16, 1951, reversing the final judgments of the trial court rendered in favor of respondents, nullified and held for naught the rights of the respondents under their contracts judicially established in the lower court which resulted in an abridgment of their rights and immunities as citizens of the United States and of the State of Minnesota in contravention of Section 1, Article 14, of the Amendments of the United States Constitution, and the decision of this Honorable Court under said Amendment, deprived respondents of their liberty and their property without the due process of law and denied to each of them within its jurisdiction the equal protection of the law" (R. 335).

By intendment of the petitioners as disclosed by their petition, petitioners were denied due process of law, as well as equal protection of the law under the aforesaid 14th Amendment by the highest State Court rejecting and nullifying the verdict of the jury, which was not challenged there by the appellants and was considered of no weight and benefit to petitioners by the highest State Court, in their opinion; the

Minnesota state statute governing trial by jury is herewith set out, which, by intendment and argument of want of due process and lack of equal protection, made under the aforesaid 14th Amendment, which violation rendered said statute invalid.

Sec. 546.03 of *1949 Minnesota General Statutes:*

> *"Issues, How Joined. Right to Jury Trial.*
>
> "Issues of law, unless referred as provided by statute relating to referee, shall be tried by the court. In action for recovery of money only, or specific real or personal property, or for a divorce on grounds of adultery, the issue of fact shall be tried by a jury, unless a jury trial be waived or a referee be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent or of the court to order that the whole issue or any specific question of fact involved therein be tried by a jury or a referee."

The intendment of the petitioners as disclosed by their petition to the highest State Court in their claim of lack of due process of law and equal protection of the law by the highest State Court involved and included the statute of Minnesota governing the adoption of children, is herewith set out, and was included by intendment and argument as falling within the 14th Amendment aforesaid, which statute, as applied, was rendered invalid under aforesaid decision.

Sec. 259.01, *Minnesota Statutes 1949:*

> *"Adoption; Petition and Consent.* Any resident of the state may petition the district court of the county in which he resides for leave to adopt any child not his own. If the petitioner be married the spouse shall join in the petition. All petitions for the adoption of a child who is a ward or pupil of the state public school shall be made jointly by the person desiring to adopt such child and the superintendent of the state public school. The director of social welfare may determine that the joinder of the superintendent in the petition shall be his consent to the adoption of the ward or pupil, as prayed for in the petition. A person of full age may be adopted."

Section 259.07:

"*Status of Adopted Child.* Upon adoption such child shall become the legal child of the persons adopting him and they shall become his legal parents with all the rights and duties between them of natural parents and legitimate child. By virtue of such adoption, he shall inherit from his adopting parents or their relatives the same as though he were the legitimate child of such parents and shall not owe his natural parents or their relatives any legal duty; and, in case of his death intestate, the adopting parents and their relatives shall inherit his estate as if they had been his parents and relatives in fact."

II. Whether, under the protecting provisions of the aforesaid Section 1, Article 14 of Amendments of the Federal Constitution, in each of petitioners' actions to recover for each a child's share in the estate of Albie C. Sansbury, deceased, under an oral agreement of adoption, at the commencement of said trials which were consolidated and tried together, petitioners and respondents before said trial agreed and consented that the question in the case, namely, whether the oral agreement alleged in petitioners' complaint was ever entered into, be submitted to a jury; and accordingly that question was submitted to a jury, which jury rendered a verdict in each of petitioners' cases that such an oral agreement had been made, which verdict was affirmed by the trial judge. Said verdicts were unchallenged on appeal from the trial court to the Supreme Court of Minnesota and the Supreme Court of Minnesota, in its decision, ruled that the verdicts of the jury were of no significance, yet reversed the judgments buttressed on said verdicts. The applicable decisions of this Court and the aforesaid 14th Amendment of the Federal Constitution as well as the State statute governing jury trials aforesaid, as applied, was rendered invalid, the rights of the petitioners by such decision were abridged and they were deprived of their rights thereunder.

III. Whether, under Section 1, Article 14 of the Amendments of the United States Constitution, in the actions by petitioners, adopted children of deceased against the administrator of the estate of Albie C. Sansbury, deceased, and another, also an adopted child of the deceased, for specific performance of the oral agreement of adoption after full completion thereof, each for a child's share in the estate of said deceased, was entered into on one side by the intestate, Albie C. Sansbury, and on the other side by petitioners and their mother, deceased; further that petitioners' mother only on consideration that said deceased Albie C. Sansbury would receive and adopt petitioners as his own children and become and be a natural father to petitioners, would she marry him; whereby and whereupon their marriage, petitioners were accepted and received into intestate's family and household and became members thereof as his natural children, and intestate became a natural father to petitioners and in all respects by virtue of such relationship there was present and grew and remained between them reciprocal obedience, service, society and affection. In reversing the judgments in the trial court wherein the estate had been divided into four equal parts decreeing defendant DeKarlo an equal share with each of the petitioners of said estate, the Supreme Court of Minnesota, the highest Court in the state, as a ground for said reversals, held that the evidence presented by petitioners was insufficient to sustain the judgments rendered in the trial court; however, the said Supreme Court held that the agreement involved was one for the making of a will and that the evidence was insufficient to support that kind of an agreement; while in fact, as disclosed by petitioners' pleading and issues made by the denial thereof by respondents, all the testimony in the record involves the establishment of the relation between Albie C. Sansbury and petitioners of that of parent and children under an oral agreement of adoption,

which decision by the highest State Court under the applicable decisions of this Court and under Section 1, Article 14 of Amendments of the Federal Constitution and the State statute aforesaid, as applied, governing the adoption of children, constituted an abridgment of petitioners' rights and a denial of due process of law and the equal protection of the law under the aforesaid statute and aforesaid 14th Amendment of the Federal Constitution.

Reasons Relied on for the Allowance of the Writ

Petitioners' actions are brought to enforce their rights to each of a child's interest in the estate of Albie C. Sansbury, deceased, against his administrator, R. R. Nelson, and another, also a child of deceased, to enforce an oral agreement for their adoption made by their mother and themselves on one side, and Albie C. Sansbury on the other, at the time of their mother's marriage to the decedent in 1907. The salient facts and circumstances of the matters involved are set forth in the "Summary Statement" above. The record discloses that petitioners' mother had been twice married, having had two children with the first marriage, and one child, Marvel Sansbury, with the second marriage, which children she obtained custody of when divorcing her two husbands. She was concerned over the welfare of these children. Upon her marriage to Albie C. Sansbury, the record discloses that she made it a consideration of her marriage to Albie C. Sansbury that he take her children as his own children and become a natural father to them and treat them as a natural father would. The evidence as a whole with inference fairly and reasonably arising therefrom was such as tended strongly, if not conclusively, to show that the agreement was made as aforesaid and that the petitioners became members of Albie C. Sansbury's family and household, and that the relationship of parent and children then commenced and con-

tinued with all the intimacies, society, service, love and affection of parent and children, which persisted until the death of Albie C. Sansbury April 26, 1948. In the trial to secure a child's interest in the estate before a jury and court, judgments were obtained decreeing each petitioner a child's interest in the estate of Albie C. Sansbury, he having died intestate. On appeal to the Supreme Court of Minnesota, the aforesaid judgments were reversed based on the theory that the aforesaid mentioned oral agreement was one to make a will in behalf of petitioners, and not to adopt petitioners, and said Supreme Court ruled that the evidence was insufficient to sustain the agreement to make a will, yet, however, failing to consider the agreement which the evidence discloses was actually made for the adoption of petitioners under the aforesaid oral agreement establishing the relationship of parent and children between Albie C. Sansbury and petitioners. Such ruling is erroneous and not in accord with the applicable decisions of this Court and is contrary to the provisions of the 14th Amendment of the Federal Constitution and in violation of the due process and equal protection clauses thereof, under which the State statute governing trial by jury was invalidated and the state statute governing adoption of children was invalidated, which decision nullified the rule that the evidence considered by a jury and a Court should be viewed in the light most favorable to the petitioners, giving them the benefit of every inference favorable to them that may be fairly and reasonably drawn from the evidence; that the credibility of the witnesses and the weight to be given to their testimony are for the trier of facts by jury and judge; and that if on the issue involved reasonable and fair-minded men may honestly draw this inference from the evidence, such issue is not one of law for the Supreme Court but one of fact for the jury and judge in the trial court.

It is undisputed that petitioners Muriel F. McCarty and Ray Franklin Bushaw were members as children of Albie C. Sansbury's family until each married, and the relation of parent and child was only broken by the death of Albie C. Sansbury. Petitioner Marvel Hierlmier remained single and lived at home and took the Sansbury's name.

The Supreme Court of Minnesota ruled that petitioners in effect were no more than employees and servants of Albie C. Sansbury, which ruling is in conflict with the applicable decisions of this Court and invalidates the State statute governing the adoption of children and is violative of Section 1, Article 14 of the Amendments of the Constitution of the United States.

The record discloses the background of Alice Ames Hierlmier and Albie C. Sansbury before and after their marriage, as well as the four children, including the petitioners and defendant Margueriette H. DeKarlo. Albie C. Sansbury at the time he courted Alice Ames Hierlmier was a sergeant in the National Army stationed at Fort Snelling, who on or about his marriage became an employee of the Chicago, Milwaukee & St. Paul Railway, and remained such an employee until he retired on a pension about a year before his death. The record discloses that Mrs. Sansbury purchased on time payments both of the homes which she and her husband and children lived in (R. 117-118). The inheritance she secured from her mother helped to pay for the homes and title thereto was held in joint tenancy, and she died March 21, 1947, leaving the title in Mr. Sansbury, who died intestate April 26, 1948. The record also discloses that petitioner Ray Franklin Bushaw dismantled a large barn and out of the lumber therefrom and additional lumber, built the first house on the Sun Kist acres at 79th Street on the Mississippi River, mentioned in the record.

The record discloses that defendant Margueriette H. DeKarlo came into the Sansbury home in 1916 as a ward of the State, she having been born out of wedlock, and was adopted through Court procedure in 1923. The record discloses that she was a child of Albie C. Sansbury with another woman. Mrs. Sansbury condescended to make her also a member of the Sansbury family and forgave the breach of the marriage vows by her husband, and could not have anticipated that she would claim to be the sole heir of Mr. Sansbury, by disinheriting the blood children of Mrs. Sansbury. Respondent Margueritte H. DeKarlo, after the death of both of the Sansburys, turned the tables on her adopted mother by claiming that her own step-brother and step-sisters, who had been orally adopted by Mr. Sansbury many years before, were now to become disinherited by Margueriette H. DeKarlo. She commenced probate proceedings within about a week after the death of Albie C. Sansbury, naming herself as sole heir to the estate of Albie C. Sansbury, who died intestate.

Petitioners have substantial rights to be protected and which are in jeopardy as well as involves the fructification of a long family life with the incident remunerations thereof which is attempted to be jeopardized by a late comer as a member of the family, who is conceded a child's share in petitioners' action, amounting to a frustration of this family entity that had its beginning in 1907 and lasted for more than forty-two years, as the Record discloses.

The record of the trial court reveals that the scales of justice was not unfairly weighed in arriving at the decision both by jury and judge. No unfair or inequitable agreement was attempted to be established. The intimate relationship of parent and children between petitioners and Albie C. Sansbury were proved. The Supreme Court of Minnesota failed in application and appreciation of the standards required by the Due Process clause and the Equal Protection of Law

clause of the aforesaid Amendment to petitioners. It cannot be reasonably claimed that one set of inferences rather than another can so easily be substituted, namely, the Supreme Court findings appeared readily to have been substituted for the finding of a jury and the findings of a trial judge in a trial that lasted for four days. The decision of the Supreme Court of Minnesota wholly failed to vindicate the public policy particularly involving establishing homes and parental supervision of children giving a fuller family life to both parent and child.

Petitioners' case constitute controversies of importance with respect to both legal and equitable principles. It involves the deep relationship of the human family as a unit in our society, living in one household in the relation of parent and children where the basis of filial love, service, society and affection between the children and their parents fostered and should be encouraged, and the record discloses that with the three petitioners in the family, Albie C. Sansbury and his wife, the mother of petitioners, lived a conjugal life which apparently was sustained by the family life including the petitioners, and it was only death that separated them. It is submitted that the evidence in the record discloses an unusual family life and it is the family that is all important in making for a corner stone in our constitutional edifice of democratic government in which the family is the smallest group unit.

The Supreme Court of Minnesota, in reversing the judgment of the trial court, violated petitioners' rights guaranteed them by Sec. 1, Article 14 of the Federal Constitution.

Wherefore, petitioners pray that their petition for rehearing herein of their petition for a writ of certiorari be considered and granted and thereupon petitioners be granted leave to file their petition for writ or certiorari herein and the same be issued by this Honorable Court in the herein entitled action to the Supreme Court of Minnesota, No. 35287, being the designated number of petitioners' cases in said State Court and be reviewed by this Court as provided by law, and upon such review said decision and judgment of said State Court be reversed and that Petitioners have such other relief as to the Court may seem appropriate.

February 18, 1952.

MURIEL F. MCCARTY,
RAY FRANKLIN BUSHAW AND
MARVEL SANSBURY,
By her Guardian ad Litem,
Petitioners.

E. LUTHER MELIN,
Counsel for Petitioners,
1301 Fourth Avenue South,
Minneapolis, Minnesota.

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 381

MURIEL F. McCARTY,

Petitioner,

RAY FRANKLIN BUSHAW,

Petitioner,

and

MARVEL SANSBURY, by MURIEL F. McCARTY, her Guardian ad Litem,

Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING OF PETITION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND FOR SUCH RELIEF AS TO THIS COURT MAY SEEM APPROPRIATE.

Opinions of the Court Below.

The opinion of the Supreme Court of Minnesota in the cases above entitled, which the petitioners here seek to have reviewed, is reported in 47 N. W. 2d 595, 233 Minn. 362, and appears on pages 272 to 280 of the Record filed herein.

Statement of the Case.

The essential facts of these cases are believed to be fully stated in the "Summary Statement" in Petitioners' Petition for a Re-hearing of Petitioners' Writ of Certiorari, and in the interest of brevity are not reported here.

Specifications of Error to Be Urged.

The Supreme Court of Minnesota in its opinion in said cases and in its denials of petitioners' Petition for Re-Hearing erred

1. In holding and deciding that the oral agreement in question was one to make a will in behalf of petitioners.

2. In not holding and deciding that the oral agreement was one for adoption of petitioners and was consummated.

3. In holding and deciding that the evidence was insufficient to support the judgments in favor of petitioners in the State trial court.

4. In reversing the judgments based on verdicts of the jury and findings of the trial judge obtained by petitioners in the State trial court.

5. In dismissing petitioners' Petition for Re-argument.

Summary of the Argument.

The evidence adduced at the trial of the aforesaid cases herein on the issue that each petitioner was entitled to a child's interest and share in the estate of Albie C. Sansbury, he having died intestate, under an oral agreement with him whereby petitioners were adopted as his children, was amply sufficient to support the judgments of the trial court decreeing each petitioner a child's interest, a one-quarter interest in the estate of Albie C. Sansbury. On appeal by respondents, the aforesaid judgments were reversed by the Supreme Court of Minnesota, the highest Court in the State, for the

reason that the evidence was insufficient to support the favorable judgments for the petitioners. Petitioners, after the aforesaid decision by the Supreme Court of Minnesota, duly made a petition for re-argument to said Court setting forth, among other grounds therein, the federal question that the aforesaid decision so rendered was violative of petitioners' rights guaranteed them under Article 1, Section 14 of the Amendments of the United States Constitution. The contentions of petitioners in their argument are rested upon the aforesaid Fourteenth Amendment of the Federal Constitution and authorities and cases cited in the argument in support thereof.

Argument.

These are actions brought in the District Court, Hennepin County, Minnesota, to enforce an oral agreement by which petitioners became members of the family of Albie C. Sansbury, deceased, and his natural children, and he became their natural father and would do by them what a natural father would do, an oral adoption by him of petitioners, made on or about the time their mother married Albie C. Sansbury in 1907, who thereafter lived a conjugal life until death separated them by the demise of Mrs. Sansbury, March 21, 1947, and the death of Mr. Sansbury followed on April 26, 1948. Defendant Margueriette H. DeKarlo was adopted by Mr. and Mrs. Sansbury by court procedure in 1923. The aforesaid children lived as members of Mr. Sansbury's family and in one household in the relationship of parent and children with reciprocal service, obedience, society, love and affection until they married, except for petitioner Marvel Sansbury who never married and lived as a member of the family until the home was broken up by the death of the parents, which affection, respect, regard and love between Albie C. Sansbury and the children, the petitioners, persisted until the death of

Albie C. Sansbury; evidence in support of which is disclosed in the "Summary Statement" herein.

Jurisdiction of this Court is sought under 28 U. S. C., Sec. 1257 (3).

In *Watts vs. Indiana*, 338 U. S. 49, at page 50, in the margin, it is stated:

> "While the state courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharge of that responsibility there hangs over them the reviewing power of this court."

Petitioners are in this Court because the Supreme Court of Minnesota, the highest State Court, in its opinion, subverted their rights by its decision here challenged under Section 1, Article 14 of the Amendments of the Constitution of the United States.

The Court in the above cited case, at page 51, states:

> "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings when that conclusion incorporates standards of conduct or critical judgment, which in themselves are decisive of constitutional right. Such standards and criteria measured against the requirements drawn from constitutional provisions and their proper application are issues for this court's adjudication. Hooven-Allison Co. vs. Evatt, 324 U. S. 652, 659, and cases cited. Especially in cases arising under the Due Process Clause, it is important to determine between issue of fact that are here foreclosed and issue of fact which, though cast in a form of determination of fact, are the very issues to review which this court sit. See Norris vs. Alabama, 294 U. S. 587, 589; Marsh vs. Alabama, 320 U. S. 50, 51."

In *Hooven-Allison Co. vs. Evatt*, 324 U. S. 652, 659, it is stated at page 659:

> "* * * the state court without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating facts generally. The inference from these facts, that petitioner, techni-

cally, was but a purchaser of merchandise after it had been imported into this country. The conclusion, that petitioner was not importer and the fibre had ceased to be imports after sale to purchaser.

"In all cases coming to us from a state court, we pay great deference to its determination of facts. But when the existence of an asserted federal right or immunity depends on appraisal of independent facts of record or where reference to the fact is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to examine the facts as well as the law in order to determine for ourselves whether the essential right or immunity is to be sustained. Kansas City S. R. Co. vs. Albers Commission Co., 223 U. S. 573, 591; Truax vs. Corrigan, 257 U. S. 312, 325; First National Bank vs. Kreford, 273 U. S. 548, 552, and cases cited. Fiske vs. Kansas, 274 U. S. 380, 385-386; Norris vs. Alabama, 294 U. S. 587, 589-590."

In *Herbert vs. Louisiana,* 272 U. S. 312, speaking of the effect and power of the 14th Amendment of the Federal Constitution, the Court states:

"What it does require is that state action whether through one agency or another shall be consistent with the fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions and not infrequently are designated as the 'law of the land.' Those principles are applicable alike in all the states and do not depend or vary with local legislation. Costello vs. McConnico, 168 U. S. 674, 682-683; West vs. Louisiana, 194 U. S. 256, 261-267; Patterson vs. Colorado, 208 U. S. 454, 459; Pullman Co. vs. Knott, 235 U. S. 23, 25; Enterprise Irrigation District vs. Farmers Mutual Canal Co., 243 U. S. 157, 166."

The challenged decision of the highest State Court in depriving petitioners of their rights falls under the ban of the aforesaid decisions.

In *Crane vs. Hahlo,* 258 U. S. 142, 145, the Court, speaking of nature of contracts, said at page 145:

"It has long been settled by decision of this Court that

the word, 'contract,' in Sec. 10, Art. 1 of the Constitution, is used in its usual or popular sense as signifying an agreement of two or more minds upon sufficient consideration to do or not to do certain acts, mutual assent (express or implied) to its terms is of its very essence."

Judge Cardozo, in his opinion in *DeCicco vs. Schwerzer,* 221 New York 431, quoted at page 48 the above federal case and statement, and Judge Cardozo continued with reference to marriage contracts, at page 439, in the following language:

> "The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements and seeks to uphold them. It puts them for many purposes in a class by themselves. (Phalen vs. U. S. Trust Co., 186 N. Y. 178, 181.) It has inforced them at times when consideration, if present at all, has been dependent upon doubtful inferences. (McNutt vs. McNutt, 116 Ind. 545; Appleby vs. Appleby, 100 Minn. 408.) It strains, if need be, to the utmost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others."

Petitioners' actions were brought to secure their own shares in the estate of the intestate, Albie C. Sansbury, and before another adopted child consummated her action to acquire for herself the whole estate of the intestate, and yet the actions could not have been brought earlier since the vested rights of petitioners as heirs arose only after the death of Albie C. Sansbury, their ancestor under the agreement establishing the relation of father and children between him and petitioners. *Jefferson vs. Fink,* 247 U. S. 288.

The refusal of the highest Court of the State to sustain and enforce petitioners' agreement in question constituted a denial to them of the equal protection of the laws contrary to the 14th Amendment of the Constitution. *Shelley vs. Kraemer,* 334 U. S. 1.

In *Wilkerson vs. McCarthy*, 336 U. S. 53, 70-71, the reasons given for taking jurisdiction under a writ of certiorari is stated in the following language at page 70:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below, but whether in passing on disputed questions of fact and in drawing inferences from proven facts the function of the trier of facts has been respected."

In *Aiken vs. Wisconsin*, 195 U. S. 194, 206, the Court, speaking of trier of facts, said:

> "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved."

Federal rights are denied as well by refusal of the State Court to decide questions presented as by erroneous decision of them. *Lawrence vs. State Tax Commission*, 286 U. S. 276, 282.

Whether the federal right set up in the State Court was denied or not given due recognition is a question on which claimants are entitled to invoke the jurisdiction of this Court on certiorari. It is the province of this Court to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. The record discloses the findings of the appellate court that the evidence was insufficient to support an oral contract to make a will, when the record discloses the fact that the oral contract in question was one of adoption of petitioners by the intestate. *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine vs. Michaux, et al*, 279 U. S. 737.

When the decision of a State Supreme Court, due to error in applying the Federal Constitution, leaves unanswered a question of State law that may be determinative of the case, the Court vacates the judgment and remands the case for further proceedings. *Clark vs. Williams*, 292 U. S. 112.

The highest Court of the State of Minnesota substituted its judgment for that of the jury and for that of the trial judge, both of which heard the witnesses and saw them while testifying and were solely qualified to pass on the credibility of the witnesses and the weight of the evidence of all of the witnesses.

The rule has been announced, if the error in a decision is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the federal constitutional guarantees. *Patterson vs. Colorado,* 205 U. S. 454.

The syllabus of the case, in the language of the Court, omits controlling issues governing:

> "1. In a suit for specific performance of an oral contract to make a will disposing of property or to adopt a child, the contract must be proved by clear, positive, and convincing evidence, and it must be definite and certain in its terms. The burden is upon the plaintiff to show by full and satisfactory proof the fact of the contract and its terms before specific performance may be granted.
>
> "2. Evidence examined in plaintiffs' separate actions for specific performance of alleged oral contract to devise and bequeath real and personal property owned by stepfather at the time of his death and *held* insufficient to sustain finding of trial court that such agreement was made" (R. 272, 328).

The opinion of the highest Court of the State demonstrates that it completely failed to consider the oral agreement for adoption and the evidence in support thereof made at time of marriage of Mr. and Mrs. Sansbury and the taking into the family the wife's three children by the husband as his natural children, and he to become and be their natural father, who would do by them what a natural father would.

The petitioners could not have raised their federal question before their petition for re-hearing but this did not preclude the highest Court of the State to consider the federal right

raised therein instead of a dismissal without opinion. *Vandalia Ry. Co. vs. Indiana,* 207 U. S. 357, 367.

If the language used discloses intendment to raise federal questions in the one seeking writ of certiorari, that will be sufficient. No particular form of words is essential. It is only necessary that the federal claim and the ground therefor be brought to the attention of the State Court and if the record as a whole shows a clear intendment that this was done, consideration thereof will be had. *Dewey vs. Des Moines,* 173 U. S. 193, 199; *Bryant vs. Zimmerman,* 278 U. S. 63, 67; *St. Louis I. N. Sory Co. vs. Starboard,* 243 U. S. 592, 598; *Dahnke-Walker Co. vs. Bondyrant,* 257 U. S. 282. The section, 28 U. S. C. 1257 (3), authorizes the Supreme Court of the United States to review by certiorari decisions in State Courts where any right, title, privilege or immunity is specially set up or claimed under the Federal Constitution, treaties or statutes or under a commission held or authority exercised under the United States. The phrases, "drawn in question" and "specially set up and claimed," usually spoken of as sufficient to have "properly presented" or "properly raised," have come to be interpreted as having no separate meaning but in fact are considered synonymous so far as raising the federal question. Whether a federal question was sufficiently and properly raised in the State Court is itself a federal question in the decision of which the Supreme Court is not concluded by the view of the highest State Court. *Honeyman vs. Hanan,* 300 U. S. 14, 18; *Boyd vs. Thayer,* 143 U. S. 135, 180; *Davis vs. Wechsler,* 263 U. S. 22, 24; *Radio Station WOW, Inc., vs. Johnson,* 329 U. S. 120, 127-129. The rule which, in effect, attempts to raise a federal question in a petition for re-hearing, yields, of course, to the governing principle that the State practice must afford a litigant an opportunity to have the claimed federal right heard and determined and that even if the Court refuses

to pass upon the question, the raising will be timely if the question is advanced at the earliest opportunity. The federal question of petitioners was brought into the case by an unexpected decision of the highest State Court against them and petitioner had no prior opportunity to assert the claimed federal right or immunity, and as and when made was timely and legal. *Brinkeihoff-Farmer Trust Co. vs. Hill,* 281 U. S. 673, 677, 678; *California vs. Arkansas,* 338 U. S. 345. The decision of the highest State Court could not reasonably have been anticipated. In fact, it came as a surprise in view of the evidence in the record and the law governing, and the favorable verdict of the jury and the favorable findings, conclusions and memorandum of the trial judge.

Petitioners have substantial rights to be protected and which are in jeopardy as well as involves the justification of a long family life with the incident remunerations thereof which is attempted to be jeopardized by a late comer as a member of the family, amounting to a frustration of this family entity that had its beginning in 1907 and lasted for more than 42 years, as the record discloses.

This Court will pass upon the constitutional question although not properly presented by the record if there is also present some other ground upon which the case may be disposed of. This rule has found most varied applications.

A State Court cannot, by omitting to pass upon evidence or to make findings of fact, deprive a litigant of the benefit of a federal right; and it is the duty of the Supreme Court in the absence of findings, to examine the evidence to determine what facts might reasonably be found therefrom which would furnish a basis for the asserted federal right. *Carlson vs. Curtis,* 234 U. S. 103, 106; *Merchants Natl. Bank vs. Richmond,* 256 U. S. 635, 638; *Brooklyn Savings Bank vs. O'Neil,* 324 U. S. 697, 703.

If the State Supreme Court makes no findings of fact, but reverses the decision of the State trial court, which has found the facts with the same force and effect as the verdict of a jury, on the ground that plaintiffs' case was legally insufficient under the federal statute, it is the duty of the Supreme Court to determine for itself whether the facts found by the trial court justified recovery under the federal law. If so, there is a further inquiry whether there was substantial evidence to support these findings. *Jones Natl. Bank vs. Yates*, 240 U. S. 541, 552, 553.

Obviously, the exception under which the Supreme Court of the United States may analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter will be especially applicable in cases where the State Court makes a general or ultimate conclusion of facts. *Norfolk & Western Ry. vs. West Virginia*, 236 U. S. 605, 609-610.

Where the existence of the alleged federal question itself depends upon a finding of fact, the Supreme Court of the United States will examine the facts to see whether the evidence adequately sustains the finding. *King vs. Putnam Invest. Co.*, 248 U. S. 23; *Truax vs. Corrigan*, 257 U. S. 312-324; *Davis vs. Wechsler*, 263 U. S. 22, 24; *Treichler vs. Wisconsin*, 338 U. S. 251, 252.

The Supreme Court will review the findings of fact by a State Court when the federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts. *Fisk vs. Kansas*, 274 U. S. 380, 385-386; *United Gas Public Service vs. Texas*, 303 U. S. 123, 148; *Aetna Life Ins. Co. vs. Duncan*, 266 U. S. 389, 394.

The Supreme Court, however, is not concluded by State Court's designation of an issue as a mere question of fact, when the matter decided was not the finding upon a disputed question of fact but a conclusion bearing upon the construction of a statute. *Acme Hawesler Co. vs. Burken Lumber Co.*, 222 U. S. 300, 305, 306. Similarly, State Courts cannot avoid review by Supreme Court of the United States of their disposition of the constitutional claim by casting it in the form of an unreviewable finding of fact. *Williams vs. North Carolina*, 325 U. S. 226; see *Norfolk & Western Ry. Co. vs. Maxwell*, 298 U. S. 682; *Chicago & Allan Ry. Co. vs. Wiggins Ferry Co.*, 119 U. S. 615, 622, 623; *Davis vs. Wechsler*, 263 U. S. 22, 24.

If facts alleged setting forth federal right are demurred to and the State Court sustains the demurrer and the case proceeds to judgment, otherwise of the pleading, the Supreme Court is at full liberty to consider the facts alleged as were the State Supreme Court in order to determine the legal effect as a deprivation of the federal right specially set up and claimed. *Boyd vs. Thayer*, 145 U. S. 135, 180; *Truax vs. Corrigan*, 257 U. S. 312, 324; *Postal Telegraph Cable Co. vs. Newport, Kentucky*, 247 U. S. 464. The federal right cannot be defeated by the form of local practice and we cannot accept as final a State Court's interpretation of allegations in the complaint asserting it. *Brown vs. Western Ry.*, 338 U. S. 294, 296. A determination by a State Court jury that a confession is voluntary is not conclusive upon the Supreme Court when the independent facts show that as a matter of constitutional law it was involuntary. *Chambers vs. Florida*, 309 U. S. 227, 228-229; *Ward vs. Texas*, 360 U. S. 547, 550; *Ashcraft vs. Tennessee*, 322 U. S. 143, 148; *Malenskie vs. New York*, 334 U. S. 401, 404; *Haley vs. Ohio*, 332 U. S. 596, 599.

The decision of the Supreme Court of Minnesota in nulli-

fying an independent verdict on one question of fact, which was not questioned by the respondents coincident with the nullifying of the findings of fact and conclusions of law of the trial judge surrounding the unchallenged verdict of the jury was a construction of the applicable law, the effect of which violated petitioners' rights to due process of law and equal protection of the law guaranteed them under the 14th Amendment of the Federal Constitution.

The 7th Amendment of the Federal Constitution provides in part that:

> "No fact tried by a jury shall otherwise be examined in any court of the United States than according to the rule of the common law."

This amendment has been held to apply to review by the Supreme Court of the United States of the verdict of State Court juries. *Maxwell vs. Dow*, 176 U. S. 581, 598; *Chicago B. & I. R. Co. vs. Chicago*, 166 U. S. 226, 242-246. Concurring opinion, Justice Black, in *United Gas Public Service vs. Texas*, 303 U. S. 123, 152-153; *Dower vs. Richard*, 157 U. S. 658, 667; see also *Termanullo vs. Chicago*, 337 U. S. 1; *Stromberg vs. California*, 283 U. S. 359.

Petitioners, under the aforesaid cases and the aforesaid amendment, had a right under the 14th Amendment aforesaid, to have the verdict of the jury respected by the highest State Court. The jury, the record discloses, was chosen by agreement and consent of both petitioners and respondents to decide the question of fact whether the oral agreement for the adoption of petitioners was actually made, and the jury answer was that such an agreement had been made in each of petitioners' cases.

The appraisal of the veracity and effect of witnesses lies with the trier of facts, whether judge or jury, or both.

Yutterman vs. Sternberg, 86 F. (2d) 321, 111 A. L. R. 736, speaking of trial facts, the Court said, at page 324:

"His was the lawful privilege of taking into consideration the manner and appearance of the witnesses on the stand; their way of testifying; the probability or improbability of the testimony which they gave; their respective opportunities to see and hear the things about which they gave testimony; and their apparent capacity and willingness to truthfully and accurately relate what they saw and heard. He could consider the contradictions, errors, and improbabilities in the situation as detailed, and the kinship and business relations of the witnesses, and doing all these things, which were among his legal rights, reach the truth if he could."

The Court also resorted to a State decision of Missouri and adopted its language, prefacing the same by the following remark:

"* * * Creamer vs. Bivert, 214 Mo. 473, loc. cit. 479, 113 S. W. 1118, 1120, the reasons back of the rule, thus: 'The bulk of the testimony was oral. In such condition of things, while this court has said over and over again that the whole record must come here in equity cases, so that (sitting as the final arbiter in chancery) we may weigh and decide de novo and thus do equity, yet the court is also fond of saying that deference should be given to the trial chancellor. He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sign, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching over-eagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from

the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. Therefore, where an issue in equity rests alone on the credibility of witnesses, the upper court may with entire propriety rest somewhat on the superior advantage of the lower court in determining a fact.'"

In the case entitled *Lavender, Administrator, vs. Kurn, et al,* 327 U. S. 645, this Court said, in part, at pages 646-647:

"Following a trial in the Circuit Court of the City of St. Louis, Missouri, the jury returned a verdict in favor of petitioner and awarded damages in the amount of $30,000. Judgment was entered accordingly. On appeal, however, the Supreme Court of Missouri reversed the judgment, holding that there was no substantial evidence of negligence to support the submission of the case to the jury. 354 Mo. 196, 189 S. W. 2d 253. We granted a certiorari to review the propriety of the Supreme Court's action under the circumstances of this case."

Near the conclusion, after having discussed the case at pages 652 and 653, this Court further said:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citations omitted.) It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different infer-

ences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees."

The solemn verdict of a jury of 12 citizens after four days' attendance in the trial of this case is treated with scant regard by the Supreme Court; yet, it has brushed aside the verdict of the jury as insignificant judicial procedure, yet the Court finds that the jury verdict formed the basis of the trial judge's findings. Moreover, the verdict is not challenged by the appellants. Set out below is a part of the opinion in reference to the status of the jury verdict in this case which is violative of petitioners' rights guaranteed them by the 14th Amendment of the Federal Constitution, as well as state statutes governing jury trials:

"The trial court's other related findings of fact and its conclusions of law granting specific performance, awarding each plaintiff an undivided one-quarter interest in the assets of said estate and other relief, likewise were predicated upon the jury's special verdict in each case.

"On appeal, defendants contend that the trial court's finding No. XXII, above quoted, and its other related findings, its conclusions of law therefrom and order for judgment for plaintiffs are not justified by the evidence and are contrary to law. At the oral argument, defendants' counsel conceded that the evidence was sufficient to support the special verdict of the jury in each case,

i.e., that Albie C. Sansbury agreed to consider and treat plaintiffs as his own children, but maintained that the trial court's findings are not justified by the evidence and that the special verdict of the jury does not support the lower court's decision" (R. 277).

"The special verdict of the jury, which was adopted by the trial court, merely established that Mr. Sansbury agreed that the relationship of natural father and child should exist between himself and the plaintiffs. It established the fact that Mr. Sansbury promised and agreed to treat and consider the children as if they were his own. That is neither an agreement nor a promise that at his death he would give and leave them his property. Even a natural child has no assurance of a vested inheritance. He may be cut off without a cent. He is not the born or created promisee of property. Clearly, the expressed intention and agreement of Mr. Sansbury to treat plaintiffs as his own children was only a normal development following his marriage to their mother, and the understandable desire of a stepfather to get along harmoniously in the atmosphere which marriages of this kind frequently engender.

"What the evidence shows that plaintiffs did, young as they were while living in the Sansbury household, was nothing more than normally would be expected of children under the same and similar circumstances. What they did they normally would be expected to do for their own mother while living in her home and what any stepchild would do for a stepfather who permitted such child to remain in his home and whom he promised to treat as his own child. There is nothing in what Mr. Sansbury said or what the plaintiffs did from which it can be inferred that a binding contractual arrangement such as that alleged by plaintiffs and found by the trial court was effected" (R. 279, 280).

The Supreme Court of Minnesota was in error in holding that the evidence was insufficient to support the agreement establishing the relation of parent and children between intestate Albie C. Sansbury and the petitioners below;

The syllabus of this case is composed of two paragraphs

and the only reference to the agreement of parent and child in question consists of five words; namely: "or to adopt a child." The opinion in paragraph 1 of the Syllabus discloses that the agreement involving the adoption of petitioners was abandoned and the Supreme Court of Minnesota rested its decision instead upon paragraph 2 of the Syllabus, an agreement between intestate and petitioners to make a will devising one-quarter interest of his estate to each of the petitioners. The only reason the expression, "one-quarter interest," was used is due to the fact that the petitioners conceded a child's interest to respondent DeKarlo, which would divide the estate into four parts. Excerpts of the opinion, including the Syllabus and paragraph 1 of the Opinion, is set out below. This Opinion is violative of petitioners' rights guaranteed them under the 14th Amendment of the Federal Constitution and state statutes governing adoption of children:

"SYLLABUS

"1. In a suit for specific performance of an oral contract to make a will disposing of property or to adopt a child, the contract must be proved by clear, positive, and convincing evidence, and it must be definite and certain in its terms. The burden is upon th plaintiff to show by full and satisfactory proof the fact of the contract and its terms before specific performance may be granted.

"2. Evidence examined in plaintiffs' separate actions for specific performance of alleged oral contract to devise and bequeath real and personal property owned by stepfather at the time of his death and *held* insufficient to sustain finding of trial court that such agreement was made."

OPINION

"1. It is well settled in this State that a person may by oral contract bind himself to give his property to certain designated persons at his death, and that such con-

> tract may, under certain circumstances, be specifically enforced. * * * The terms of the contract, however, must be so definite and certain as to leave no doubt as to its meaning. * * * Morover, the burden is upon plaintiff to prove the fact of the contract and its terms by clear, positive, and convincing evidence before specific performance may be granted."

The confusion of the Supreme Court in dealing with the issues in this case involving the establishment of the relation of parent and children between the intestate Albie C. Sansbury, and the petitioners under a proved oral agreement establishing that status, is manifest. The Court failed woefully to scrutinize the salient points in the evidence and wholly overlooked material evidence, as well as distorted some very important evidence. It formulated in its opinion a fictitious basis by distorting plain evidence into meaning something that the plain words used deny, thereby forming the basis for the conclusion that was arrived at in the opinion. A portion of the opinion indicative of the statement above is set out below, which opinion is violative of petitioners' rights guaranteed them under the 14th Amendment of the Federal Constitution:

> "2. In the instant case, it appears that the only direct promise Mr. Sansbury ever made to plaintiffs was during the conversation around the family dinner table at the Garfield Hotel when Mrs. Rempher, Mrs. Sansbury, Mr. Sansbury, and the children were talking about getting 'a farm and * * * a home away from that hotel,' because 'It wasn't the place for children,' and Mr. Sansbury 'spoke up' and said 'to Muriel and Ray and all of us,' 'If you kids do your part, why, *I will do my best as a father to you children and go out on this place* [farm].' The record discloses that Mr. Sansbury kept his promise and did provide a home and small acreage in the 'farming districts' then in the City of Minneapolis, and that plaintiffs in turn did their part by raising a garden, taking care of a horse, a cow, tending chickens, and doing other household duties.

"All the other evidence offered by plaintiffs in support of the alleged contract consisted merely of statements made by Mr. Sansbury, not to plaintiffs, but only to Mrs. Rempher and Mr. Frenzel. Mr. Sansbury told Mrs. Rempher that 'he was taking these children and going to do the best by them that he could.' He also said to Mrs. Rempher, 'I have agreed to take these three children as my own children and treat them as a natural parent would.' In 1938, Mr. Sansbury told Mr. Frenzel that 'he would take care of the children just like his own' and that he 'was going to provide for each of them when he passed away.' However, there was no mention of a will. Viewing the testimony of Mrs. Rempher and Mr. Frenzel in its most favorable light for plaintiffs, it does not constitute clear, positive, and convincing evidence that Mr. Sansbury ever promised or agreed that upon his death he would give and leave to each of the plaintiffs a one-quarter interest in all the property, real and personal, of which he might die seized and possessed, as alleged by plaintiffs and found by the trial court. Furthermore, it does not prove that Mr. Sansbury ever promised or agreed to adopt plaintiffs or that he promised or agreed to leave them anything upon his death. There was no offer or acceptance of such a contract. There was no promise or agreement to that effect. There was no promise or agreement on Mr. Sansbury's part that he would make any provision for plaintiffs by will or otherwise when he died. The most that can be said from the evidence in this respect is that Mr. Sansbury expressed plans for future action in which each of the plaintiffs might be considered favorably. However, proof of a mere expression of intention is not proof of a contract" (R. 278-279).

The Supreme Court of Minnesota was in grave error in holding that the evidence in the case was insufficient to sustain the judgments of the trial court and thereby violated petitioners' rights guaranteed them under Section 1, Article 14 of the Amendments to the Federal Constitution.

Petitioners therefore pray that this Court will consider this Petition for Re-Hearing of Petitioners' Petition for a Writ of Certiorari herein and upon consideration thereof grant petitioners leave to file their Petition for Writ of Certiorari and that same be issued by this Court directed to the Supreme Court of Minnesota to the end that the decision of the Supreme Court of Minnesota, No. 35287, wherein petitioners are named respondents and respondents are named appellants, be reviewed by this Court as provided by law, and that upon such review said decision be reversed and the petitioners have such other relief as this Court may deem appropriate.

Dated February 18, 1952.

MURIEL F. MCCARTY,
RAY FRANKLIN BUSHAW,
MARVEL SANSBURY,
By her Guardian ad Litem,
Petitioners.

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